

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

THETA IP, LLC * December 16, 2021
*
VS. * CIVIL ACTION NO. W-20-CV-160
*
SAMSUNG ELECTRONICS ET AL *

BEFORE THE HONORABLE ALAN D ALBRIGHT
MOTION HEARING (via Zoom)

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1 DEPUTY CLERK: Motion hearing in Civil Action W-20-CV-160,
2 styled Theta IP, LLC versus Samsung Electronics Company,
3 Limited and others.

4 THE COURT: Announcements from counsel, starting with the
5 plaintiff, please.

6 MR. JOHANNINGMEIER: Hello, Your Honor. This is Corey
7 Johanningmeier with Bunsow DeMory. And with me is Denise
8 De Mory. And we have Russ Horton on the line. We have Aaron
9 Hand. And then we also have our client representative,
10 Demetris Paraskevopoulos. And I believe earlier we had our
11 client representative, Bruce Bourbon on, I'm not sure if he is
12 right now. We also have a couple other lawyers from our firm
13 watching, Hillary Bunsow and Mike Flynn-O'Brien.

14 THE COURT: And Mr. Cordell? Or whoever else is going to
15 announce.

16 MR. CORDELL: Good afternoon, Your Honor. Ruffin Cordell
17 from Fish & Richardson. And with me are my colleagues, Marty
18 Black and Michael Song of the Dechert firm, and Travis
19 Underwood from Gillam & Smith. And I believe we have a client
20 representative, Mr. Tim Jezek.

21 THE COURT: And welcome to him, of course.

22 I have down -- I don't have really a chart. I know we
23 have three different issues to take up. The one that I have
24 that just popped up first is Theta's motion regarding lack of
25 noninfringing alternatives.

1 But if there's something else you all wanted to argue
2 before that, I'm agnostic in what order we take them up.

3 MR. JOHANNINGMEIER: We're happy to do that one first,
4 Your Honor.

5 THE COURT: Okay. Then let's do that one first.

6 MR. JOHANNINGMEIER: I reckon that one will me talking.
7 We also -- we prepared some slides which I believe Mr. Hand is
8 going to attempt to display and run. So we'll see if that
9 works or not. I don't know if those are --

10 THE COURT: Works for me. I can see them.

11 MR. JOHANNINGMEIER: All right. Great. And so I'll just
12 call out slides as we go along.

13 So this is a motion for partial summary judgment that
14 Samsung has not presented any noninfringing alternatives, and
15 cannot do so at trial.

16 Let's go to Slide 23.

17 The fundamental issue here is that acceptability of
18 noninfringing alternatives must be considered in order for them
19 to be noninfringing alternatives. They don't work as
20 noninfringing alternatives if they're not acceptable --

21 THE COURT: I think you can skip over this part.

22 MR. JOHANNINGMEIER: All right. So I have two slides of
23 cases saying that. And so we'll go --

24 THE COURT: I'm up to speed on this issue.

25 MR. JOHANNINGMEIER: Right, right. So the -- let's go

1 then to Slide 26 and the specific testimony here.

2 So this is just a basic that it's Samsung's burden and
3 it's -- they failed to produce evidence on the specific issue
4 of -- on a number of issues, but specifically on acceptability.

5 So there's three categories of noninfringing alternatives
6 that they at least mentioned along the way. The first of which
7 here is the sort of ambiguous prior art solutions. They, all
8 the way through, even depo, refused to identify which prior art
9 references they were going to rely on here.

10 In fact, when I asked direct questions to their expert
11 about that, he couldn't tell me specific ones. But the bottom
12 line here is that, you know, we asked him straight out did he
13 consider whether or not any of those prior art solutions would
14 be technically feasible for Samsung to implement. That's not
15 in his report. I mean, that's his testimony. He didn't do it.

16 So there's no analysis from Samsung's expert, or anyone in
17 the case, about the feasibility of those arguments. So it's
18 just a straight up failure of proof. They don't get to present
19 those things as alternatives at trial without presenting
20 testimony about their feasibility. You know, whether or not
21 they'd be -- would work and all of that.

22 There's some mention in the opposition brief of, you know,
23 Samsung having pointed a few of these things out to our
24 witnesses in deposition. But, you know, their response to it
25 coming up for the first time live in a deposition was to say

1 things like, well, that isn't going to work.

2 But, of course, this is not our burden and they can't
3 shift the burden to us by putting these things in front of our
4 experts and asking them what they think. What they think is
5 this stuff doesn't work, but that's not the issue. The issue
6 here is that these prior art solutions aren't alternatives
7 unless Samsung does the work to show that -- you know, at least
8 a minimal showing that they would be commercially and
9 technically feasible. They haven't done anything on that
10 front. So these are just straight out.

11 The next slide is the -- Slide 27. So this is similar.
12 Here there's two prior art Theta patents, the '330 and the '728
13 that were in, you know, of -- the Court will -- may recognize
14 were in the prior case, the Eastern District of Texas case
15 there, the one that ended with the covenant and that we've been
16 discussing all along.

17 Now, those two patents, they've suggested that, you know,
18 because they have a license to those through the covenant, that
19 those are noninfringing alternatives. And the -- you know,
20 they, I guess, would have the right to practice those, of
21 course. But that isn't enough. And, in fact, there's cases in
22 our brief that say that that's not enough just to say you have
23 a license to something. You have to show you could actually do
24 it, that it would actually be feasible --

25 (Clarification by the reporter.)

1 MR. JOHANNINGMEIER: So you have to actually, then, show
2 that the alternative would be feasible, that they could
3 practice this. Now, no one in this case has analyzed whether
4 or not the accused products in this case practice those --
5 these patents. Samsung didn't do that. So we don't know.

6 They -- you know, they insist they didn't infringe before
7 in the prior case with different products. There's no overlap.
8 But with the different products they didn't infringe. With
9 these products that we're accusing now, they haven't done the
10 analysis.

11 But more importantly, they haven't even opined that
12 it's -- would be feasible to do. We asked the straight
13 question, would it -- you know, have you done any analysis of
14 it, whether or not it would be technically feasible for them to
15 implement those patents?

16 I don't have the details of that in my report.

17 He didn't do the analysis. They can't come in as
18 noninfringing alternatives without some analysis that they
19 would be feasible, that they would work.

20 Again, we have expert testimony that they wouldn't, but
21 that's not the issue because this is Samsung's burden. And
22 Samsung didn't produce any actual cogent evidence of this.

23 So now, the third one on the next slide, 28, so Samsung
24 in -- I guess it was in August, gave a list of technical
25 solutions that they thought were noninfringing alternatives.

1 And they really only pursued one of those, in terms of actually
2 having their expert talk about it or having anyone say
3 anything. And that's this idea of, well, just use a larger
4 battery.

5 Now, here we have the same problem, though. Mr. Kiaei did
6 not look at the feasibility of using a larger battery. We
7 asked him if it was an insignificant effort to increase the
8 battery size, why wouldn't they have already done that, right?

9 And then he says, well, first, he says, I think you're
10 asking the wrong person, which I guess is a cute response,
11 given the lack of information we got from Samsung on this. But
12 then he says, there's a number of other things I would need to
13 look at, and to do a cost analysis of various different issues.

14 So he understands what he'd have to do.

15 Then the question: Did you do any of that analysis in
16 your report?

17 No. I was not asked to do that.

18 All right. He did not -- he focused on infringement and
19 invalidity. He did not consider the technical feasibility of
20 putting in a different battery, right? He just said, ah,
21 that'd be trivial, right?

22 And based on his experience, which is exactly the kind of
23 expert testimony that Daubert is meant to get rid of. Because
24 you can't just have an expert come in and say, look at me, I'm
25 credentialed. In my experience this would be simple. That

1 isn't reliable testimony. It's not based on any facts. The
2 actual facts that he could have done, he didn't do.

3 So on the next slide, 29, we have some more on that. He
4 didn't talk to anyone at Samsung, none of their witnesses about
5 any issue in this case, but definitely not about this one. He
6 didn't ask them about the possibility of increasing the battery
7 size. He didn't ask them how much it would cost, whether or
8 not there were bigger batteries available. He just didn't do
9 that analysis.

10 And then he also -- we asked him again, you didn't do any
11 analysis of how much it might cost in engineering time to
12 change to a different battery? He didn't do that analysis.

13 So we don't know how much it cost Samsung to develop a
14 bigger battery and put it in a phone. It's -- you know, that
15 could be a \$1 million effort. It could be a \$200 million
16 effort. We don't know that, because we don't have any
17 testimony from anyone. And their expert didn't ask and didn't
18 do the analysis. So they fall down on this one as well. Just
19 a failure of proof on feasibility of this alternative.

20 Now, there is -- you'll hear about some testimony, and we
21 went over it in our brief. A Mr. Choi from Samsung said that,
22 you know, there's many different batteries and we changed
23 batteries. But then when he was asked direct questions about
24 have you ever used, in any of these accused products, a battery
25 that was smaller than the biggest one you could find?

1 And he initially said, that's not a yes-or-no question,
2 started mirroring counsel's objections and, you know, refusing
3 to answer. We've got that in our brief, that testimony.

4 And then Samsung realized they weren't happy with that,
5 and so they had him go and talk to Dr. Ugone, the damages
6 expert about this, and, you know, tell him more than he told us
7 during depo, which is also very problematic. And then
8 Dr. Ugone has an opinion based on things that, you know, he
9 reportedly heard from Dr. Kiaei and from Mr. Choi about this
10 issue. But it all falls down on the fact --

11 THE COURT: Does he express those opinions in a report
12 anywhere?

13 MR. JOHANNINGMEIER: Yes. And we have that in our brief,
14 the citations to -- I believe to his report -- and if it's not
15 in ours, it's in theirs -- where he essentially says he talked
16 to Mr. Choi and Mr. Choi said that they have options on
17 batteries. And that it -- he's basically said this idea of
18 using a smaller one happens all the time.

19 But then when we asked him about that in deposition, about
20 whether or not he had any example of an accused product doing
21 that, he did not. So even though he did talk to Mr. Choi, they
22 still couldn't come up with an example in any of the accused
23 products of that happening. And that's all -- that's detailed
24 in the briefing.

25 Now, I will say, though, that that only gets to part of

1 the question, right? Whether or not it's something that could
2 be done, or whether or not they could develop a bigger battery
3 is one aspect of this. How much would it cost? Would it be
4 feasible? Would it cost less than paying Theta? None of that
5 is in the report. So they still have a fatal flaw in terms of
6 acceptability for this battery, even with the, you know, paltry
7 testimony that they've offered.

8 So now, the -- I guess the next slide.

9 Slide 30, just to make it -- the point here about
10 discovery. You know, we asked for this with a high degree of
11 specificity back in January. You know, describe in detail all
12 facts, including technical, commercial and financial details
13 and concerning any acceptable noninfringing alternative. That
14 was the rog.

15 The first meaningful response we got for this -- if you
16 show the next slide -- was in August. And this is what they
17 said on the battery. They said, an alternative is to include a
18 larger capacity battery. Okay. Well, that doesn't have much
19 detail. And then they also say in this one that they could get
20 this for free by waiting a year or two for a bigger battery.

21 Now, that, of course --

22 THE COURT: I can ask you -- I need to -- about
23 30 seconds. I'll be right back.

24 MR. JOHANNINGMEIER: Yeah. Okay.

25 THE COURT: Thank you very much for that. I'm happy for

1 you to continue.

2 MR. JOHANNINGMEIER: Okay. Thank you, Your Honor.

3 So I was just pointing out there, a couple aspects of
4 their rather short interrogatory response on this issue that,
5 you know, it has no details. But n one of the details they do
6 attempt to raise is the idea of waiting a year or two for a
7 significantly larger battery.

8 Now, I mean, I think anyone that has been to even anywhere
9 close to this business knows that Samsung is not going to wait
10 a year to release a phone for a bigger battery. So this gets
11 at the whole point of why it has to be commercially acceptable,
12 right?

13 You know, no one would -- you know, it hardly meets
14 reputation that that's not an option. And that isn't
15 ultimately what they argued, that they were going to wait a
16 year. But, you know, this was the response we got in
17 discovery, so this is what we had to work with going into the
18 deposition. And then when we got to the deposition, we got,
19 well, we didn't do the analysis.

20 So the point here, and I think I have it on the next
21 slide, Slide 32, is that, you know, the failure to disclose
22 these facts in discovery on its own is -- warrants exclusion
23 under the MLC case which people are citing a lot these days.

24 But the point there was the party had facts in their
25 possession that they didn't put in their responses. And they

1 got dinged and excluded for that. And this is, you know -- it
2 was, you know, based on -- but the Federal Circuit affirmed the
3 district court's discretion to exclude that.

4 So -- and then, again, also on the facts, they didn't
5 present enough to be -- to get above that bar, the discovery
6 bar. And on the expert opinion they gave nothing. And so, you
7 know, we have a whole list of cases in our brief. There's one
8 here on the screen, the LaserDynamics case where failure to
9 look at whether or not these alternatives would be feasible or
10 whether the company could implement them or how much they cost
11 is grounds for exclusion.

12 So I guess that is, in sum, our argument. And then I
13 will -- I'll let Mr. Cordell talk. And then we'll, I guess,
14 reserve a little time for rebuttal, if necessary.

15 THE COURT: Mr. Cordell, is it you or someone else?

16 MR. CORDELL: I -- it'd be me, Your Honor. Good
17 afternoon. Ruffin Cordell from Fish & Richardson on behalf of
18 Samsung.

19 You know, this issue is one that comes up a lot. And, you
20 know, we --

21 (Clarification by Reporter.)

22 MR. CORDELL: This headset and I don't get along very
23 well, it turns out.

24 So we spent a lot of time in the briefing discussing who
25 shot John. But the way this case unfolded is pretty profound.

1 You know, counsel just brought up my MLC Micron case and said
2 you know, gosh, they should have put this in their discovery
3 responses early on.

4 But we did. We put in the noninfringing alternatives that
5 we could ascertain, because the difficulty we were having is
6 that Theta, right at the outset, didn't say anything about
7 their theory of infringement or what it was worth.

8 And if we're going to talk about MLC Micron, they should
9 have put these disclosures in their Rule 26 submission. It
10 should have come right at the outset of the case. And that's
11 what MLC tells us the plaintiff is supposed to do. And had
12 they done that, we wouldn't be having any of these discussions,
13 because a complete record would have been created.

14 Instead what we got is, you infringe. And, in fact, they
15 pointed to a different instrumentality. They pointed to the
16 IntelliCeiver portion of what they thought was in the Qualcomm
17 chip in Samsung's phones.

18 Turns out they were wrong. And in June of this year they
19 finally gave us new infringement contentions and switched their
20 theories altogether. But the suggestion that somehow we should
21 have been able to predict, you know, some kind of divining
22 process about exactly what it is they were going to claim
23 simply just -- it's not supported in this record. Just the
24 opposite is true.

25 What happened is they tell us finally -- well, in

1 discovery they tell us, we're not going to give you any
2 disclosure about our damages. You're just going to have to
3 wait. And you're going to have to wait until the expert
4 reports have happened in September.

5 And in their expert report they actually gave us something
6 that was a little bit of a surprise. Because Your Honor has
7 seen a lot of these cases, and typically the plaintiffs come in
8 and while the valuation they asked for, the \$200 million, was
9 substantial, they claim that the (audio disruption) in this
10 case contributes to battery life by 2.6 percent. A very modest
11 amount, what counsel accurately called trivial. This was a
12 trivial change in the amount of power savings that we're
13 talking about.

14 And so yes, our experts --

15 (Clarification by the reporter.)

16 MR. CORDELL: But what we found is that they deposed our
17 expert, and he said, yes, I've got a lot of experience in
18 choosing batteries. I worked at Motorola for many years. I've
19 been through this process a great deal. And it's not a big
20 deal that, you know, you talk to the vendors and they tell you
21 what's available. And you kind of pick a battery based on a
22 lot of things.

23 But what he said very specifically is that 2.6 percent
24 doesn't require a significant amount of work. It just doesn't.
25 And they deposed Mr. Choi and they asked him. And he went

1 through lots of the processes that Samsung goes through as
2 they're choosing batteries. And very little of it has to do
3 with a 2.6 percent increase in the capacity of the battery.

4 But the evidence that came from those two witnesses is
5 that what you're talking about is a couple of human hairs, that
6 if you made the battery two human hairs thicker, you would
7 achieve this 2.6 percent capacity increase.

8 Plaintiff doesn't like that. They want NASA-level
9 analysis to support that kind of evidence. But they can't deny
10 that these two witnesses have a great deal of experience in
11 acquiring these batteries and implementing these batteries, in
12 putting them in exactly these systems. And that's the evidence
13 they offered.

14 I looked back through all of what plaintiff pointed to,
15 and I looked beyond it in the depositions and whatnot, and at
16 no time did they ask them a straight-up question, how much
17 would it cost to implement a 2.6 percent increase in battery
18 capacity? They danced around it. They asked lots of
19 background questions. They asked about how the process works,
20 but they never put that question straight up.

21 And so Dr. Ugone, when he was doing his actual
22 noninfringing alternatives analysis, did that -- did that very
23 analysis. And he went right at it chapter and verse.

24 And let me see if I can share my screen, which is always a
25 dangerous thing.

1 This is Exhibit 8 to the motion papers, Your Honor. And
2 you can see this is from Dr. Ugone's report, our damages
3 expert. And he specifically talks about Alternative 8, using a
4 higher capacity battery. And he immediately says, I understand
5 that Samsung could have obtained the additional battery life
6 attributed by Theta to the patents-in-suit through a small
7 increase in the size of the batteries in the accused products.

8 And then he goes through it in great detail. And he
9 points out that he did have a conversation with Mr. Choi, and
10 relates much of what's in Mr. Choi's deposition about how
11 Samsung gets bids from multiple battery suppliers for a
12 particular size battery. And then they do a comparison, and
13 that capacities can differ by 2 to 3 percent across suppliers.
14 And that they pick a battery based on lots of different
15 factors. But some of which may be charging or other things
16 that Mr. Choi mentions. But that they ultimately make that
17 decision.

18 And he made it very clear that battery size and battery
19 capacity are variable rather than fixed during the development
20 of the phone. That it is -- it's not only possible that you
21 would choose a different one, but it often happens. That it's
22 a variable you can fix, up or down or however it is that you
23 choose.

24 He then goes into the fact that the plaintiff's expert,
25 Dr. Larson, somehow -- and we've got a motion on this -- but he

1 somehow divines that this -- these patents-in-suit that deal
2 with somehow changing the amplification of certain signals
3 extends battery life by 20.9 minutes. It really is a
4 breathtaking analysis, and I look forward to the day when we
5 argue that motion.

6 But taking that for what it is, he then goes into a very
7 specific analysis of discussions with our witness and Dr. Kiaei
8 about what it would take to achieve the same result. And what
9 he concludes here is that you need an increase in the range of
10 1 percent to 3 percent of the battery capacity in order to
11 achieve the results that the plaintiff is claiming.

12 He then goes into a very detailed analysis where he looks
13 at the costs of the batteries. And using a proportionality he
14 ends up with a table here, Table 12 which I've got on the
15 screen, where he does a very precise calculation of what this
16 additional battery capacity would cost. If, in fact, one were
17 to need to adopt it instead of the patented approach.

18 So the bottom line is there is an enormous amount of
19 evidence here. There's an enormous amount of information that
20 was available to the plaintiff. They explored it to the extent
21 they wanted to. And what I'm left with, as I look at this, is
22 that it really is a -- it's the subject of perhaps vigorous
23 cross-examination. But the decision we're talking about here
24 is trivial. It's why did you pick Coke versus Pepsi? Nobody
25 denies that you could pick Coke versus Pepsi. And you may have

1 lots of reasons, one way or the other, that we --

2 THE COURT: I don't take the decision of Coke versus Pepsi
3 as a trivial decision.

4 (Laughter.)

5 THE COURT: That may be one of the most important
6 decisions I have to make every day at lunch. So -- because I
7 won't drink Pepsi, ever.

8 MR. CORDELL: Well, not to pander to Waco, but I'm a
9 Dr. Pepper guy myself.

10 THE COURT: So, very good.

11 MR. CORDELL: But it's still a decision.

12 With respect to the other sort of classes of noninfringing
13 alternatives, there are really two. One is the prior art. And
14 counsel says, you know, there's no evidence that you could have
15 gone back and used the Hutchinson patent, the Qualcomm
16 patent -- patented approach as part of your -- as a
17 noninfringing alternative.

18 But there is a stark admission from his expert,
19 Dr. Larson. It's a stark admission that that was not only
20 available, but it would probably have worked. It's at
21 Exhibit 14, 288, 15 through 291, 20.

22 So, you know, again, what we're talking about here is
23 whether or not there is evidence in the record of that
24 acceptability, and it's certainly there.

25 And then finally, with respect to the parent patents, I

1 really got a kick out of this, Judge. Because if you remember
2 what we're arguing about here is they sued us in 2016 on two
3 patents. And they -- we went through -- on to litigation. We
4 had experts. We had about 18, 20 months of fighting about
5 this. And we go to depose their expert on infringement on
6 these patents. And what does he say? He ends up conceding
7 that there is no infringement. And the case kind of founders,
8 of course. I mean, their expert admits that he thinks there's
9 no infringement.

10 We, then, negotiated a covenant not to sue. You've heard
11 a lot of these facts before. And we executed the covenant not
12 to sue. So we have the God-given right now to practice those
13 two patents.

14 What, now, Theta says is, well, wait a minute. You're on
15 the horns of a dilemma. You can't have it both ways. You
16 can't have not infringed those and yet choose it as a
17 noninfringing alternative today. Because -- and by the way, we
18 think maybe the patents are the same. The patents from the old
19 case and the patents in this case are the same.

20 But really, Your Honor, they're the ones that have the
21 dilemma. They're the ones that are facing either double
22 patenting invalidity or an admission that, in fact, they're
23 different. And they're going to have to choose that, and I
24 suspect they're going to choose that the patents are different.

25 The issue for a noninfringing alternative is not whether

1 or not we're using it today. It's not whether or not anybody
2 ever actually used it. The issue is could it be used? And the
3 reality is the entirety of that first case, the entirety of
4 their allegations and the entirety of their assertions in that
5 case support one basic notion, which is, it is a viable system.
6 And the idea that we have to somehow prove that with extrinsic
7 evidence is not part of the case law.

8 What Grain Processing tells us is that it's got to be a
9 viable alternative. But it doesn't have to be proven to the
10 level that plaintiff, you know, asks. The Grain Processing
11 case, of course, they were 12 years beyond when the
12 implementation actually happened. So it really isn't that kind
13 of a didactic analysis.

14 So with that, Your Honor, unless there are other
15 questions, I'll pass the podium.

16 THE COURT: Response from plaintiff?

17 MR. JOHANNINGMEIER: Yeah. I have a couple of things.

18 First I'll just start where counsel did with the -- I
19 guess, the discovery record in this case. So, you know,
20 battery savings is a claim element here.

21 He mentions our Rule 26 disclosures. So I just kind of
22 want to read something from that that we have here, about
23 whether or not we disclosed our theory. So "Plaintiff
24 preliminarily identifies potential royalty bases associated
25 with the implementation of the patents-in-suit as including

1 incremental revenue and/or cost savings" -- there it is on the
2 screen -- "associated with power savings associated with such
3 implementation, including, e.g., reduction in power
4 requirements, battery capacity, size, et cetera." So it's just
5 nonsense that we didn't disclose our theories of this case.

6 Now, we've heard a lot over this case about our
7 contentions and whatever. As Your Honor knows, we had three
8 rounds of contentions in this case, because -- and we had
9 motion practice after our second round in which Your Honor
10 ordered them to produce more documents and we volunteered to
11 give additional contentions in June.

12 So, you know, we've disclosed everything that we had to
13 disclose all along, including in our Rule 26. There is no
14 question here.

15 What actually happened in this case is that Samsung didn't
16 believe that they need to show feasibility, or didn't
17 understand that they didn't, and did not, right? Mr. Cordell
18 said the question is, could it be used? Well, you have a
19 license to it, right? In the case of the prior patents. Could
20 you build it? Well, no. I mean, we don't know, right?

21 What Mr. Larson said about the Hutchinson reference the
22 first time he was shown it was that, you know -- because it had
23 not been identified prior to his deposition as a noninfringing
24 alternative. He was shown it and he said, well, I mean, maybe
25 you'd save some power, but that's not a very good solution.

1 But, again, it's not our burden to demonstrate this stuff,
2 it's theirs. They have the burden to show noninfringing
3 alternatives, and they didn't meet it. They did not analyze
4 the cost. Is it viable? We don't know, because we don't have
5 any testimony from them.

6 So our speculation about, you know, the fact that we might
7 say it's not, that we might say, well, you know, those prior
8 patents aren't as good these patents which we have. And that,
9 you know, that these ones we have now are better. That isn't
10 the issue.

11 The issue here is that they have to show feasibility,
12 viability, whether it could be used, availability,
13 commercial -- I mean, however you want to say it. They have to
14 show that they actually have it as an available alternative,
15 and they have not done so with the specific reference to
16 Mr. Ugone's testimony and Mr. Choi.

17 So Mr. Choi told us -- we asked them direct questions
18 like, would your group ever pick a battery that did not meet
19 the largest capacity of the options presented? Or do you
20 always choose the option with the highest capacity?

21 Then there was an objection: Compound. Calls for
22 speculation.

23 His answer: I agree. It depends on the circumstances and
24 it does require speculation.

25 I mean, we have this exchange in our brief that basically

1 he was refusing to answer. All of this stuff that's in Ugone's
2 report from Mr. Choi is not testimony. It's his conversation
3 with Mr. Choi, right? And that is not admissible evidence,
4 right?

5 So they want to come in at trial and have him present
6 things that he talked to Mr. Choi about. But when we talked to
7 Mr. Choi, he was evasive and couldn't answer these questions.

8 So we put the direct question of costs to Mr. Kiaei who
9 put himself out as an expert who worked on batteries at
10 Motorola. And he said, well, I'd need to do a cost analysis.

11 And then we said: Did you do it?

12 No. He didn't do it.

13 So what else is there for us to do at that point, right?
14 It's their burden. They put up an expert that says he didn't
15 analyze the costs. That should be the end of it. He shouldn't
16 get to come to trial with a cost analysis, right?

17 And as far as Mr. Ugone goes, I think Mr. Cordell
18 described it as a complicated analysis. He took the percentage
19 that we put forward as what we put forward a percentage for
20 battery savings. Their expert used some different numbers and
21 calculated it the same way to get a lower percentage. And then
22 Mr. Ugone just subtracted that percentage from the cost of the
23 battery, right? That's his analysis.

24 He said, well, okay, it's 1.whatever percent. Here's
25 1.whatever percent of the battery costs. That's not an

1 analysis of whether or not it would be feasible. Its not an
2 analysis of whether or not they could put a bigger battery in.
3 And it's not an analysis of how much it would cost them in
4 engineering time, lost market opportunity and whatever else to
5 actually build that. That's the thing they're missing, not the
6 price of the battery. We know the price of the battery. We
7 can figure out a percentage and a price. But what they're
8 missing is the actual analysis.

9 So with that, I don't have anything else unless Your Honor
10 has questions.

11 THE COURT: I don't. I'm going to deny that motion.

12 Let me turn to the next motion. Give me one second.

13 And to the extent there's a motion to strike that is
14 overlapping with this, I'm going to deny that as well.

15 The next motion we have is -- and, again, I think there
16 are two motions left. I don't care what order we take them up
17 in. The one opened -- when I opened it was Samsung's motion
18 for summary judgment of indefiniteness. Is that the one that's
19 best to take up next? I don't care.

20 MR. BLACK: Yes, Your Honor. I'm going to take that one.

21 THE COURT: Okay.

22 MR. BLACK: We appreciate your jumping on this, Your
23 Honor. We were looking at the preparation for trial last week,
24 and with all the motions pending, we thought we ought to single
25 out the ones that could have the most importance to shaping the

1 trial coming up. And of course when we got on, Mr. Cordell, my
2 co-counsel, stole my thunder by getting his motion argued
3 first, but of course that was inevitable.

4 But we actually asked for this hearing to have this motion
5 heard.

6 THE COURT: Well, as at least some of you know, if you
7 clerked, I get no credit for this. I played no role in the
8 decision to set this hearing. I just -- I asked what I was
9 doing on Thursday afternoon and y'all are up. So credit goes
10 to my favorite law clerk, whichever one it is that is working
11 on this case that set this. So he gets all the credit. They
12 don't -- they learned it's better, you know, to just get in
13 trouble later than to ask for permission ahead of time. So
14 we're all here today together.

15 MR. BLACK: All right. Well, I've heard he's an
16 extraordinary clerk, Your Honor, from people in doubt.

17 So we asked for the hearing because of a serious problem
18 in claim construction which has arisen as a result of moves
19 that the plaintiff has made during the course of the case.
20 They originally filed this case based on one theory and one
21 instrumentality called IntelliCeiver and then they amended
22 their contentions and their theories dramatically in the middle
23 of the case. And as that's happened, the claim construction
24 has moved, and then by the time we got to expert reports, we
25 got expert depositions with some pretty remarkable admissions

1 which I'd like to show you in a moment.

2 But let me just share my screen and I can show you where
3 we started the case. Can everybody see that?

4 THE COURT: I cannot.

5 MR. BLACK: Okay. Try again. How's that?

6 THE COURT: Yes, sir. I've got it.

7 MR. BLACK: Okay. Thank you, Your Honor.

8 So we started the case -- the issue in these claims is
9 that they have signal strengths that are defined as high or
10 low, and there's the desired signal which is the signal that
11 you want to receive at the phone and then there's interference
12 which can get in the way, and the patents deal with how you
13 address the interference.

14 So here's some sample signal levels on the left. Typical
15 phone might go from negative 20 dBm down to a negative 110 dBm,
16 and the desired signal and the interfering signals would be
17 measured at those levels and various things done in the claim.
18 So the whole thing starts, the whole alleged invention starts
19 with determining what's the signal level? Is it a high level
20 or a low level?

21 So no real dispute that negative 20, the highest that the
22 phone could hear would be a high, and that negative 110, which
23 is just a whisper, about to lose the signal, would be a low.
24 But we said, look. You need an upper bound for low and a lower
25 bound for high which is objective in order to meet Section 112

1 indefiniteness requirements. And that there was a big question
2 mark because there is nothing in the claim on these terms of
3 degree which would tell you where the lower boundary of high
4 was and where the upper boundary of low was.

5 And Theta responded and said -- they brought in an expert
6 Mr. Goldberg, and he said, well, you could do it. An engineer
7 could -- there's nothing in the spec and there's no -- nothing
8 that would tell you, but you could look at standard or an
9 engineer could figure it out and therefore you should go with
10 plain meaning.

11 And that's what the Court did, and we understand that and
12 we continued litigating the case.

13 Mr. Goldberg, who was their infringement -- the claim
14 construction expert at the beginning of the case, had this
15 testimony where he clearly said that he understood the claims
16 we did, that you were trying to figure out which signal levels
17 were high and which ones were low. And he said here at the
18 bottom, well, I'd look at -- we would need to look at the
19 requirements of the receiver, the bit error rate, the
20 sensitivity, a bunch of other things listed in my report,
21 et cetera, to determine what low is. And so that's how one
22 would know what low is.

23 And then the same thing with the interferer signal.

24 So plain meaning was, we look at a number, an engineer
25 would know which ones of the numbers that the receiver could

1 handle were high and which ones were low, and we disagree with
2 that because we thought the upper boundary of low and the lower
3 boundary of high were indefinite, but we understood they got a
4 plain meaning construction and we moved on.

5 Then they changed their infringement contentions and went
6 with this new theory and they didn't say anything in the expert
7 reports about how they were interpreting high or low. We did
8 not get a report that said, well, we would look at the LTE
9 standard X to determine what high levels are and what low
10 levels are or an engineer would do this or that, and it was
11 extremely puzzling because they had a plain meaning
12 construction but they had absolutely no description of how an
13 engineer would go about determining high and low.

14 So Mr. Song asked at the depositions. And this is the
15 deposition of Dr. Larson and the question was, what are the
16 boundaries? That was the question beginning of the case. And
17 he said, so -- so there's no unambiguous boundary, and,
18 therefore, in my opinion, between high and low, except that
19 clearly in the order of magnitude that's high and equal is not
20 high, and where the exact boundary occurs is ambiguous.

21 This is their expert, their evidence, not our expert,
22 saying that the boundary's ambiguous twice.

23 He said it again in the section at the bottom. And that
24 there's a transition from high to low equal where the
25 transition is is unclear. And, you know, I -- we could --

1 people could genuinely and honestly disagree about that.

2 When POSAs can genuinely and honestly disagree about
3 something, when there's no objective standard when a line in a
4 claim term that you need in order to determine the metes and
5 bounds of the -- in the mention are unclear and ambiguous, that
6 is a definition of indefiniteness.

7 So by changing their case and changing their position on
8 what high and low meant, they have rendered the claims
9 indefinite in their application.

10 Now, this was not an accident. Dr. Larson said also that
11 his order of magnitude construction was, quote, "approximate."
12 Still kind of, you know, low.

13 And then their invalidity expert said that their
14 construction, which is that any signals which measure ten
15 decibels apart, that's an arbitrary number. So here's their
16 invalidity guy -- their infringement guy saying it's ambiguous,
17 their validity guy saying the infringement guy's numbers are
18 arbitrary. That's the summary judgment record.

19 So based on the way they've applied the claims, they have
20 rendered the claims indefinite, and we, therefore, seek a
21 summary judgment of indefiniteness.

22 Now, in the alternative, Your Honor, what they've done
23 here is issued a -- only through the -- only through the
24 deposition testimony -- they've taken a very odd position.
25 They now say that high and low are not numbers, that they're

1 not specific numbers, but the negative 20, negative 30,
2 negative 40, they're saying that you compare the two signals
3 against each other, and the louder one is high and the softer
4 one is low. So that any signal could be both high and low.
5 And there's no objective way to determine when.

6 So, for example, let's say there's a negative 60 db
7 signal. The construction that we were discussing during claim
8 construction was, well, we don't know whether that's high or
9 medium, and they said, don't worry about it. Our expert will
10 be able to definitively tell you at the time we get to the end
11 of this case by looking at specifications, by looking at
12 standards, by looking at other things, but that's not the
13 position they've taken now. The position they've taken now is
14 that the 60 dBm desired signal would be high if the
15 interferer's lower, but that same 60 dBm signal would be low if
16 the interferer is higher. They're really reading these to
17 things as higher and lower rather than high and low. These are
18 relative -- they've turned this claim into a relativity problem
19 when before we had a basis for at least having a discussion
20 about which signal levels fell within which category.

21 This is a serious issue. It is a claim construction issue
22 that should have been raised at claim construction time and it
23 was not. It is not a plain meaning construction. And what
24 that means is that their expert report on infringement is
25 founded on a -- not on your construction, which was plain

1 meaning, but on a construction that they made up and first told
2 us about during the deposition. The prejudice here is severe.
3 Had we known this was their position, we would have had
4 additional prior art issues. We would have had additional 112
5 issues because there's no support for this in the specification
6 at all. And it would have led to other depositions and other
7 things that could have been done in the case, but it wasn't.

8 So our request, Your Honor, is that the claims be held
9 indefinite as applied by Theta. That in the alternative, the
10 Court find noninfringement because they did not apply a plain
11 meaning construction. And if that fails, Your Honor, we've got
12 an 02 Micro where we need a construction, we need some guidance
13 from the Court on what construction is going to be applied at
14 trial so that we can resolve the issue definitively. But given
15 the way they've applied it, given the admissions of their
16 experts that the claim language is ambiguous, this case is the
17 rare one that meets the definition of summary judgment on
18 indefiniteness based on the expert's own admission.

19 That's our submission, Your Honor.

20 THE COURT: If you guys would hold on just a second.
21 Obviously I'm going to let plaintiff respond, but I'm going to
22 take just a minute or two break. I'll be right back.

23 (Pause in proceedings.)

24 THE COURT: If we could go back on the record.

25 I don't want to seem unfair to the plaintiff, but -- and

1 not give them a chance to argue. If you -- let me tell you
2 what I'm thinking about doing and then you can tell me what --
3 whether or not you think it's the most efficient way.

4 I think, given the argument that I just heard, and I'm
5 not -- I'm making no decision in terms of the merits at this
6 second about what Mr. Black just said. But it seems to me that
7 the appropriate thing to do is to have you all brief -- have
8 the plaintiff brief why its infringement -- its expert's
9 application of plain and ordinary meaning to this claim term
10 with respect to the infringement of these products is plain and
11 ordinary meaning. And the defendant can argue that it's not.

12 In essence, I'm happy to have another Markman on this to
13 determine whether or not the plaintiff's infringement -- I'm
14 calling it contention, it's not really that, but it is the
15 infringement position -- is consistent with what is the plain
16 and ordinary meaning or whether or not the expert's gone
17 astray.

18 That seems to me to be the most efficient and fair and
19 effective way of doing this. Let me hear from the plaintiff
20 about what you think about going about it in that manner.

21 MR. JOHANNINGMEIER: Well, Your Honor, so, I mean, I am --
22 I was prepared to, you know, a number of -- I'll just say a
23 number of things that Mr. Black just said I completely disagree
24 with and think are misrepresenting what happened. But I was
25 prepared to rebut this and talk about it now and to talk about

1 with our meaning is. You know, we have a number of slides, a
2 whole list of -- so I can either -- I'm sorry.

3 THE COURT: I'm sorry. If you'd like to do that right
4 now -- I'm just saying that I want to -- I'm trying to protect
5 y'all's record on both sides. And so if you think -- and
6 Mr. Black, you know, unless Mr. Black's violently opposed to
7 this, you know, I'm happy to hear you make that -- an argument
8 that is -- entwines what I just said as well.

9 And then I may hold off on ruling today and make that one
10 of the things -- I think that's one of the options Mr. Black
11 gave me, was determination that it -- your opposition was not
12 consistent. I'm totally happy to take it up today. I just
13 wanted to make sure you all had an adequate time to brief it.
14 If you think you're prepared to move forward with it today
15 because of the briefing, I'm happy to move forward with it
16 today, and we can get something done much quicker. I'm fine
17 with that.

18 MS. DE MORY: Your Honor, could we have just a moment to
19 discuss?

20 THE COURT: Sure. Again, I want to do two things: One,
21 make sure I'm fair to everybody in giving you all time to brief
22 what is most beneficial to me, and, number two, to not have you
23 all go up on appeal where there was a fight over what the plain
24 and ordinary meaning was. I get that, and I'm going to avoid
25 that.

1 MR. JOHANNINGMEIER: And I appreciate that, Your Honor. I
2 mean, I guess -- I mean, this obviously is a case dispositive
3 issue. I mean, it's essentially a -- they're asking to
4 reconsider Your Honor's Markman ruling. You know, I think it's
5 very clear that we didn't do what they just accused us of
6 doing. I can explain that, but, I -- again, I agree I would
7 not want to go up on appeal with sort of a ruling from the
8 bench today. So on one hand I would very much like to respond
9 to Mr. Black, but, you know, if Your Honor would be more happy
10 to have briefing and maybe even a separate hearing, then we're
11 fine with that as well.

12 THE COURT: I'm happy to do whatever. And I'm not saying
13 this to cover myself. I really want you all to do what's the
14 most prophylactic for both of your sides' cases. What happened
15 in my first trial was probably because it was my first trial,
16 we wound up having the experts fighting during trial over
17 whether or not the other had used the plain and ordinary
18 meaning of a word, and that doesn't work. And so in one of my
19 last two trials we had this situation and I did the Markman
20 during the trial to try and get it right. So all I want to do
21 is if there's a fight over whether or not -- if -- Mr. Black
22 can help me if I've got this wrong, but one of his arguments is
23 that the way your expert has construed the plain and ordinary
24 meaning of a claim term falls outside of the ambit of plain and
25 ordinary meaning and that is something that is as a matter of

1 law that I need to decide, and I am -- I am going to decide
2 that and not have the jury figure that out.

3 MR. JOHANNINGMEIER: Of course, Your Honor. And I think
4 that the issue here what we have is actually -- maybe I should
5 just present really quickly what I have and then we can take
6 the issue off because I do want to respond and clarify
7 something here. I don't think there is an expert dispute
8 because their expert honestly hasn't really taken issue. What
9 we're dealing with here is counsel has an argument about what
10 we're doing and then we have a bunch of testimony that says
11 what a person of ordinary skill would understand. So I can
12 explain -- let me just walk through that briefly, I guess, and
13 then, you know, we're very happy to -- because this is such a
14 significant issue, if Your Honor thinks there is a potential
15 for a dispute at trial, which honestly, you know, there could
16 well be that it might make sense to brief it and have a
17 decision and have a clear instruction from the Court about what
18 can and can't be said on this issue at trial. We're very
19 interested in that because, otherwise, you know, we could be
20 having -- you know, to the extent what counsel just argued is
21 going to come out of the mouth of their expert at trial, that
22 would be inappropriate. So I do think it's an important issue.
23 So let me just --

24 MR. BLACK: I was just going to say just to answer Your
25 Honor, I do believe that protecting the record for everybody is

1 important and that some clarity in briefing would be very
2 beneficial. We did want to -- when I was looking at this, I
3 saw, you know what? We're going to have a train wreck at this
4 trial if we don't sort this, and that's why we asked for the
5 motion last week, and we think briefing was a very good idea.

6 THE COURT: Yeah. I think I'm going to go ahead and do
7 that. I'm just going to put a pause -- I don't want --
8 Mr. De Mory (sic), I'm worried that you're thinking, gosh, I've
9 only heard one side of it and that's not fair. I know you want
10 to get yours out too, but truly, fortunately for you all, I
11 actually had some cases that involve this technology. So as
12 you were going through the arguments, I actually understood
13 what you were saying. And so I -- in other words, I understand
14 what the fight is. And so what I would propose we do on this
15 one, and Mr. -- I'm curious for a second, Mr. Black. What is
16 the other last of the motions that we have?

17 MR. BLACK: The last motion is a motion to deal with trial
18 management really. We had earlier in the case filed a motion
19 to bifurcate the implied license defense. Actually filed a
20 motion asking for certification on appeal which hasn't been
21 acted on. It's a little late for that. But we do think that
22 that's an issue for the bench, not for the jury and that we
23 kind of need that sorted before January 4th which is six days
24 before trial. We think the most efficient thing would be to
25 have Your Honor try that issue because it's equitable, try it

1 first, but if not, we need to make sure the evidence that comes
2 in in front of the jury only is related to evidence that's
3 necessary.

4 THE COURT: Mr. Black, let me tell you the way I've done
5 this in the past, and this may not make you happy, but it's the
6 way it's been most efficient for me and then tell me what you
7 think of this. I've had several cases now where we've had
8 inequitable conduct which I don't submit to the jury. What
9 we've done in those cases is we have tried the case, and then
10 while the jury is deliberating, I've tried the bench trial on
11 the equitable issues. That way we don't lose time, but I also
12 have kept out evidence if it -- for example, if there's
13 evidence that only went to the inequitable conduct claim and
14 someone objected, I kept it out from the jury. So to me that
15 would make the most sense to me, given how close we are to
16 trial, but if you're telling me that a -- if I heard your case
17 first on this to the bench, I might say we don't need a trial.
18 Obviously, there is some appeal to that as well.

19 MR. BLACK: That is exactly right, Your Honor. If you
20 hear the --

21 (Simultaneous conversation.)

22 MR. BLACK: -- implied license defense goes to -- I'm
23 sorry. Go ahead.

24 THE COURT: No, no. Please. Go ahead.

25 MR. BLACK: I was going to say the implied license defense

1 goes back to the really central issue in the case which is in
2 the first litigation they sued us on these two patents and then
3 dropped it, gave us a license and a covenant not to sue. Then
4 they made some minor changes to the claims and sued us again.
5 And we're saying -- to the extent we're operating at all, we're
6 operating within that license and we're allowed to do what
7 we've done.

8 So there's some case law on this. Your Honor issued a
9 summary judgment ruling against us and said there's a triable
10 issue. Our view is, okay. We understand that's the law of the
11 case, but that's a triable issue for the Court to decide and it
12 would be a one day trial probably and could -- definitely a one
13 day trial and could sort out this whole case and --

14 THE COURT: Let me make this offer. I'll keep bidding and
15 see how this goes. I mean, and so -- and, you know,
16 remembering when you're giving your Yelp reviews how
17 cooperative I was. So...

18 But what if we did this? And the reason -- if this were
19 any other day other than the 3rd, you know, the problem is we
20 don't have that week before. Here's what I'm thinking we could
21 do. We could -- if you think you could get that part of the
22 case tried in the morning, we'll pick the jury when we pick the
23 jury. I'm assuming we're doing it sometime ahead of the trial,
24 and ordinarily I would start Monday morning at 9:00 with the
25 jury trial. What we could do is we could just have the jury

1 come in at 1:00 and you all could try that case, your -- that
2 bench trial in the morning at 9:00. And you'd have three hours
3 to try it, and then, you know, we'd have the -- obviously if I
4 decided in your favor, then the jury would come in for a very
5 short time. If I decided not in your favor, then we would try
6 the case. And that way we wouldn't lose too much time -- oh,
7 wait. In fact, even -- oh, no. I was going to say we could do
8 this, but y'all will actually be attending the jury picking.
9 So let's see.

10 MS. DE MORY: Your Honor, can I --

11 THE COURT: Are y'all on the 10th or the 3rd?

12 MS. DE MORY: We're on the 10th.

13 MR. BLACK: We're on the 10th.

14 MS. DE MORY: May I be heard briefly on this, Your Honor?

15 THE COURT: Sure.

16 MS. DE MORY: This is on behalf of Theta. Good morning or
17 good afternoon, as the case may be.

18 So we oppose bifurcation of this issue going first. The
19 issue here has already been litigated twice fully, and the
20 Court issued a summary judgment order in which it unequivocally
21 said there are disputed questions of fact. And those questions
22 of fact are not the questions of fact that should be resolved
23 by the Court. They are questions of fact that actually go
24 essentially to contract formation. What was the deal between
25 Samsung and Theta? Was there a deal? So the Court has already

1 determined that there was no integrated contract here, that
2 parol evidence is coming in to determine what the intent of the
3 party is. Under Texas law this formation issue is a question
4 of fact. It goes to the jury. So although ultimately the
5 Court may decide based on some findings from the jury that in
6 fact whatever the jury finds there was a deal and it had, you
7 know, these -- you know, this was the meeting of the minds,
8 this was the mutual intent, then the Court may say, okay. Then
9 I'm going to direct a result, but the summary judgment order is
10 very clear and the Court has actually considered this twice
11 already.

12 There was a motion to dismiss and then there was a summary
13 judgment motion on this issue. And the Court in the summary
14 judgment order said a number of things. It said first,
15 however, a fact issue exists as to the mutual intent of the
16 parties precluding summary judgment. But Theta demonstrated a
17 material issue of fact, that these -- the cases that Samsung
18 relies on are distinguishable because there's clear contrary
19 evidence here of intent of the parties which this Court sees as
20 a fact issue precluding summary judgment.

21 So this is not one of those issues where it's a bench
22 trial on just the documents, and Samsung has already had that
23 bench trial on the documents twice. And the Court has reached
24 its determination. In fact, in the summary judgment order, the
25 Court also says that Samsung argues Theta rejected Samsung's

1 request for a broad piece and, therefore, it's entitled to this
2 presumption that it should have an implied license. But the
3 record evidence shows that Theta expressly reserved the right
4 to sue for infringement on the continuation patents or, rather,
5 every patent other than those named in the C&S and strong
6 enough to defeat a presumption and raise a fact issue for the
7 jury.

8 So we -- we've already -- I mean, you've already actually
9 considered this issue twice and determined that there was a
10 fact issue that should go to the jury.

11 And in addition to that, it's not just that this -- that
12 you've made that determination. It's that all of these facts
13 are going to the jury anyway. Because these issues -- the
14 Court just denied the motion on noninfringing alternatives. So
15 that means the covenant is coming in, and we're talking about
16 whether or not Samsung could feasibly practice the patents that
17 were from the prior litigation.

18 We -- these are method claims, so we're talking about
19 inducement. And our evidence of inducement is completely
20 linked in the same as the evidence relating to the implied
21 license defense.

22 We resolved the last -- the last suit ended when
23 Samsung -- we gave Samsung a covenant. It came back to us. It
24 asked us, will you expand that covenant to cover the pending
25 continuations which Samsung knew about and Samsung admits? We

1 said no. And so there's -- that's going to be evidence of
2 knowledge, willful blindness, and it also comes in as to
3 willfulness.

4 So these issues are fully intertwined with the trial.
5 They are not going to simplify anything, and the Court has
6 already decided that there are disputed questions of fact that
7 should go to the jury on this. And so --

8 THE COURT: I got it. If y'all will give me just a
9 second, I need to check something with my clerk. I'll be back
10 in just a few seconds.

11 (Pause in proceedings.)

12 THE COURT: Okay. Here's what we're going to do. The
13 pretrial conference is January 4th. I need you all to get
14 together and figure out how you're going to do the briefing on
15 this claim term issue. Again, it seems to me the way to do it
16 is for the plaintiff to get me a short brief on why the --
17 explaining why the expert believes that the product -- Samsung
18 products infringe and what he did in terms of his analysis, why
19 it infringes this claim term, and then why the claim term is,
20 in fact, plain and ordinary meaning within the context of the
21 patent and the specification. That needs to be done quickly.
22 I don't know how many days, but it needs to be done quickly.
23 Then I need a response from the defendant, and that needs to be
24 done quickly, and then if the plaintiff wants to have a very,
25 very short reply, that needs to be done and to us by

1 December 3rd (sic) because my understanding is our pretrial
2 conference is on the 4th.

3 So that's what we're going to do with that part. On the
4 other part we are going to -- I'm going to not take up the
5 issue of -- that Mr. Black raised until like -- I'm going to do
6 it in my ordinary course of business which is if at the end of
7 trial there still is an issue that I believe I need to take up
8 and that it should not go to the jury, then I'll do that at a
9 bench trial while the jury is out.

10 And as we go through the course of the trial, if there's
11 evidence that one side believes is or is not admissible based
12 on it not pertaining to an issue that's going to be tried by
13 the jury, we'll just -- the lawyers can object during the
14 trial.

15 So I think that resolves everything that we had today.
16 But I'll start with Mr. Black who's in my screen and ask if
17 there's anything else -- oh, I'm sorry. My clerk just pointed
18 out. We need -- I'm going to deny the motion for interlocutory
19 certification as well.

20 So is there anything else that we need to take up today?

21 MR. BLACK: I did not have high hopes for the motion for
22 interlocutory appeal, Your Honor, and I thank you for jumping
23 on this and your creativity in dealing with that.

24 I will say one thing, that under English common law, which
25 is what actually governs through the Seventh Amendment, what we

1 have a right to trial by jury on, the fact that there's intent
2 and other issues involved, like for inequitable conduct, makes
3 no difference. This issue, Your Honor, implied license, it is
4 for you, and we look forward to trying it to you.

5 THE COURT: Well, you have Mr. Horton who may be the only
6 one of you all that has appeared recently in the Supreme Court.
7 So maybe when he and I are at lunch someday, I'll ask him to
8 explain to me the English common law because -- I'm kidding.

9 (Off-the-record discussion.)

10 THE COURT: Well, this is just more evidence of why since
11 just about everyone on this call is a thousand times sharper
12 than I am why it's a good thing I got this alternative job and
13 don't have to practice law and compete against any of you.

14 So it's -- but it's -- so I'm going to amend what I said.
15 I'm going to invite both you and Mr. Horton to lunch and we can
16 all talk about the common law and find it fascinating. So...

17 MR. BLACK: That'll be fabulous, Your Honor.

18 THE COURT: Is there anything else we need to take up
19 today?

20 MR. CORDELL: Just one little nit, Your Honor, if I may.
21 This is Ruffin Cordell. And I don't know anything about the
22 English common law because all I know is the principle code.
23 So I'm stuck in a different world, but...

24 (Laughter.)

25 MR. CORDELL: We had a little bit of a problem in that we

1 had our corporate representative slated for trial, and he's got
2 a bunch of conflicts. And so we're -- we would like to propose
3 someone else from the same department so that it's as close a
4 match as possible, but we want to be able to allow him to be
5 deposed now out of time. Does the Court have a problem with
6 that?

7 THE COURT: I have no problem with that.

8 MR. CORDELL: So we'll put him up.

9 MS. DE MORY: Your Honor?

10 THE COURT: Look. I mean, this stuff happens. You know,
11 we're all doing the best we can. We've got -- you know, I
12 don't know what a corporate representative is going to say.
13 And so, you know, I don't know that he's even going to be
14 called. I don't know what you would depose him about. And
15 so -- other than he's going to come in and say, I work for
16 Samsung. And so...

17 MR. CORDELL: We gave them a proffer just to try to
18 short-circuit the process, but we'll get it done.

19 MS. DE MORY: That's all good. We'll work it out. It's
20 not a problem.

21 THE COURT: I would do the same with you. I've allowed
22 witnesses to appear by Zoom, you know, where it's a time when
23 we've just all had to be limber and get things done.

24 MS. DE MORY: We'll work it out.

25 I think there's one other small issue that would help us

1 all avoid sending you more paper, which is that we have
2 motions -- oppositions to motions in limine and the draft
3 pretrial order due tomorrow. I know everyone on all sides has
4 been very distracted by getting ready for this hearing. So we
5 all collectively proposed that we move that date till Tuesday,
6 and so I would just ask --

7 THE COURT: No way.

8 (Laughter.)

9 THE COURT: I was going to spend my weekend going through
10 those. No.

11 MS. DE MORY: It'll just save a motion.

12 THE COURT: No. That's -- that is 100 percent fine with
13 me. As far as I'm -- yeah. No. I don't -- I really don't
14 need -- not to let you behind the Wizard of Oz' door, but I
15 will look at the motions in limine on whatever the date our
16 pretrial hearing is. I will go through -- I'll be reading them
17 as I'm -- I'll go through them and tell you what I'm going to
18 do as I read through them. And if I have any questions about
19 why -- if there's something where I think I don't know why they
20 want that, I'll ask you, but that part of this will go -- the
21 motions in limine will go very quick.

22 And so you understand, this is the way I see motions in
23 limine, which is on 99 percent of it I'm just saying you can't
24 bring it up during opening argument or without asking
25 permission of the Court. I'm not typically ruling that it's

1 inadmissible. Now, if there's something different, you know,
2 can you turn and ask opposing counsel what they said to their
3 client? No. That's a motion in limine that's kind of one of
4 the permanent ones, but if it's case specific, my view of
5 motions in limine is this: They're out until someone comes up
6 and says, Judge, we'd like -- this is why this is going to come
7 in, and that's fine.

8 Also, I have recently had more people objecting during
9 opening arguments and closing arguments than I had seen in the
10 past. I am a schizophrenic on this. On the one hand, like
11 most judges, I don't like it very much. On the other hand,
12 it's your client you're protecting, and if you feel like you
13 need to object to something, then that's your right and you
14 should do it. You should not not object during opening or
15 closing because you're worried what I'm going to do. You need
16 to protect your client. And so that's the way I see the world.
17 And so that's the way to deal with openings and closings.

18 So is there anything else we need to take up today?

19 MS. DE MORY: Nothing else, Your Honor. Thank you.

20 MR. CORDELL: Nothing from defendants, Your Honor. Thank
21 you.

22 THE COURT: Well, as always, I have the best job in the
23 world. I get to work with great lawyers over interesting
24 stuff, and I don't have to bill hours. So those two things are
25 pretty wonderful.

1 So I hope you all have a Merry Christmas or a happy
2 holiday or whatever it is -- whatever it is you observe, I hope
3 you have a wonderful holiday season. I hope that you have a
4 wonderful new year. I hope those of you who are more local, I
5 hope I see you in person in the near future at some point, and
6 if there's anything else we need take up before the pretrial
7 hearing, just let Jeff Melsheimer know and we'll do it. So
8 take care, everyone.

9 (Hearing adjourned at 3:19 p.m.)

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1 UNITED STATES DISTRICT COURT)
2 WESTERN DISTRICT OF TEXAS)
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4 I, Kristie M. Davis, Official Court Reporter for the
5 United States District Court, Western District of Texas, do
6 certify that the foregoing is a correct transcript from the
7 record of proceedings in the above-entitled matter.

8 I certify that the transcript fees and format comply with
9 those prescribed by the Court and Judicial Conference of the
10 United States.

11 Certified to by me this 16th day of December 2021.

12
13 /s/ Kristie M. Davis
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